No. 96-895

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD H. FRANKLIN, *et al.*,

Petitioners,

—v.—

TIMOTHY WILLIAM HISER,
on his own behalf and on behalf
of all other persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the Ninth Circuit correctly applied Alaska case law on *res judicata* when it held, as the Alaska Supreme Court has held, that state prisoners may litigate issues that have not been adequately litigated previously.

LIST OF PARTIES

The petition does not include a list of the parties, and the caption is incomplete. The caption correctly lists the defendants/petitioners: prison officials Richard H. Franklin, Frank Sauser, and Al Terrault. However, the caption fails to indicate that the respondent, Timothy William Hiser, filed this case on his own behalf and on behalf of all other Alaska prisoners similarly situated.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As petitioners concede, the petition raises no constitutional or statutory issues. Pet. at 4.

STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete. Several critical facts are omitted, and some statements are erroneous.

1. Petitioners (defendants) claim that *Cleary v. Smith*, Case No. 3AN-81-5274 Civ. (Alaska Super. 3d Jud. Dist.), challenged "all aspects of the conditions under which inmates were held in Alaska's prison facilities." Pet. at 5. That is not correct. Hundreds of conditions (both systemic and individual) were not challenged in *Cleary*. On the issue of access to the courts alone, *Cleary* did not challenge numerous conditions that have been the subject of dispute within the Alaska prison system, such as defendants' alleged retaliation against law clerks, their refusal to provide the means whereby non-English speaking inmates can obtain meaningful access, and their refusal to provide sufficient space for the storage of legal materials.

2. Another access issue not raised in *Cleary* -- and especially important here -- is defendants' practice of refusing to photocopy documents needed by inmates for litigation purposes. Defendants concede in their petition that the *Cleary* Final Settlement Agreement (FSA) did not address this constitutional issue, Pet. at 5, but they neglect to explain why. The fact is, during the Rule 23 "comment" period on the proposed FSA, an inmate named Hertz filed a motion to intervene in *Cleary* so that he could challenge that policy. The State strenuously opposed his motion, advising the Alaska Supreme Court on appeal that the constitutionality of its photocopying policy "was simply never an issue in

[*Cleary*]." Brief of Appellees in *Hertz v. Cleary*, 835 P.2d 438 (Alaska 1992), at 31. The Alaska Supreme Court agreed, and affirmed the trial court's decision to save this issue for another day. The court held that "[t]he issue of photocopying was not raised in [*Cleary*]." *Hertz*, 835 P.2d at 443.[1]

3. Timothy Hiser did not move to Alaska until 1991, a year after the *Cleary* decree was finalized in 1990. He entered the state's penal system in 1992.

4. Beginning in 1992, as alleged in his amended complaint, Mr. Hiser asked prison officials to photocopy certain documents he needed to initiate a lawsuit. His requests were denied. In accordance with the prison's grievance process, Mr. Hiser administratively appealed. However, the superintendent of the prison, Al Terrault, denied Hiser's appeal, stating (incorrectly) that prison officials "are under no obligation to photocopy anything . . . ." (A copy of Terrault's decision is attached to Hiser's amended complaint.) Hiser then sought relief in federal district court.

5. Hiser's amended complaint presents both a facial and an as-applied challenge. First, it alleges that the defendants have a practice of denying to a class of prisoners the right to photocopy necessary legal documents (the facial challenge). Am. Compl. at 13.[2] Second, it alleges that

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[1] Thus, it is disingenuous for the State to now claim that Timothy Hiser is seeking to "relitigate" the photocopying issue.

[2] Hiser filed this case as a class action pursuant to Rule 23(b)(1)(2), Fed. R.Civ.Proc. Paragraph 4 of the amended complaint states that class certification "is sought only for purposes of declaratory and injunctive relief and not as to damages." The district court dismissed Hiser's complaint prior to deciding the question of class certification.

plaintiff Hiser needed photocopies for litigation purposes; defendants turned down Hiser's repeated requests to provide them; and these refusals "caused plaintiff to suffer difficulty and harm in pursuing his legal claims" (the as-applied challenge). *Id.* at ¶14. Attached to the amended complaint are three examples of the defendants' refusals.

6. Defendants also fail to discuss the evidence (or lack of it) introduced in the trial court. The defendants had the burden of proof on their motion for summary judgment. Yet, they introduced only two facts regarding the photocopying policy. According to the affidavit of prison official Judy Coleman, Pet.App. 20-22, the Alaska Department of Corrections (ADOC): (1) has had the same photocopying policy since 1983, and (2) the policy provides "for free photocopying for legal materials for indigent inmates . . . in connection with pending *or proposed* litigation." *Id.* at 21 (emphasis added.)

7. This evidence is plainly unrelated to Mr. Hiser's as-applied claim. Defendants introduced no evidence whatsoever to contradict Mr. Hiser's claim that in 1992 and 1993 -- policy or no policy -- prison officials repeatedly and improperly denied *his* requests for photocopying, and that these denials resulted in actual harm to Mr. Hiser.

8. The petition contends that Timothy Hiser has only himself to blame for the denials of his photocopy requests. According to petitioners, Mr. Hiser failed to provide "satisfactory evidence" that these photocopies were actually needed. Pet. at 7. That contention is categorically untrue, which explains why defendants cite nothing in the record to support it. In fact, all of Mr. Hiser's requests stated that he needed the photocopies for proposed litigation. His requests, however, were instantly denied for the sole reason that he had no case *pending*. The exhibits attached to the amended complaint prove this.

9. Even with respect to the facial challenge, defendants' evidence is deficient. First "[n]o written memorialization of the policy was submitted." *Hiser v. Franklin*, 94 F.3d 1287, 1289 n.2 (9th Cir. 1996), Pet.App. at 5 n.2. Second, based on the evidence submitted into the record by Mr. Hiser, it is apparent that no such policy existed at Mr. Hiser's prison. As the documents attached to Mr. Hiser's amended complaint demonstrate, he made repeated requests to photocopy documents for proposed litigation, and every request was denied because he had no litigation *pending*. *See, e.g.*, Am. Compl. Exh. H (denying Mr. Hiser's photocopy request "as you have no pending court case involved with this subject.") Moreover, defendants introduced no evidence proving that any of the named plaintiffs in *Cleary* had standing to challenge the photocopying policy, even if it did exist. Defendants' failure to introduce such evidence single-handedly defeats their claim that their photocopying policy could have been litigated in that case. *See Lewis v. Casey*, __ U.S. __, 116 S.Ct. 2174 (1996).

10. Lastly, defendants failed to advise the Court that Mr. Hiser will complete his sentence, and be released, on April 18, 1997.[3]

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[3] Mr. Hiser's release will have some effect on the as-applied challenge, and no effect on the facial challenge. The as-applied challenge seeks: (1) individual damages, and (2) an injunction preventing defendants from continuing to deny Mr. Hiser's legitimate photocopying requests. Mr. Hiser's release will not moot his individual claim for damages. *See Board of Pardons v. Allen*, 482 U.S. 369, 370 n.1 (1987). However, it will moot his request for individual injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). His release will not effect the facial claim. On remand, the class will be entitled to substitute other named plaintiffs and to have the case certified as a class action relating back in time to the date of filing, assuming that the plaintiffs otherwise meet the requirements for class certification. *See United States Parole Commission v. Geraghty*, 445 U.S. 388, 404-07 (1980).

REASONS FOR DENYING THE WRIT

A. The Case Does Not Merit Review

Nothing in the decision below warrants review. As defendants admit, the petition raises no constitutional or statutory claims. Pet. at 4. On the contrary, the Ninth Circuit's decision merely applies Alaska law on *res judicata* to the unique facts of this case.

B. The Decision Below Does Not Conflict With Any Federal Court Decision

The decision below does not conflict with any federal court decision, and petitioners do not claim otherwise. It also does not conflict with any Alaska state court decision, and petitioners do not claim otherwise. On the contrary, the Alaska Supreme Court's decision in *Ferguson v. Department of Corrections*, 816 P.2d 134 (Alaska 1991), *required* the Ninth Circuit to rule as it did.

C. The Decision Below Is Eminently Correct

The district court granted defendants' motion for summary judgment and dismissed on *res judicata* grounds both the facial and the as-applied challenges to defendants' photocopying policy. The Ninth Circuit, applying Alaska law, reversed.

Petitioners note at the outset that the Ninth Circuit was required to apply state law in determining whether *res judicata* barred Mr. Hiser's claims. Pet. at 9, citing *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Petitioners then argue that the Ninth Circuit misapplied Alaska law. Significantly, however, petitioners do not cite a single Alaska decision in support of their argument.

1. The As-Applied Claim Is Not Barred By *Cleary*

Petitioners, defying logic, argue that the actions they took in 1992 and 1993 (and are still taking) regarding Timothy Hiser could have been litigated in a lawsuit that ended in 1990. They do not explain how this feat is possible.

Petitioners' argument flies in the face of Alaska law (and reality). It is clear in Alaska that "*[r]es judicata* does not act as a bar when the conduct giving rise to the later suit post-dates the conclusion of the first suit. Restatement (Second) of Judgments §24 cmt. f (1982)." *Jackinsky v. Jackinsky*, 894 P.2d 650, 656 (Alaska 1995). This is the universal rule. *See* 18 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE §4455 (1995 Supp.)

Mr. Hiser's as-applied claim seeks individual injunctive relief and damages. Mr. Hiser seeks damages to redress injuries he has suffered since 1992, and he seeks injunctive relief to prevent future violations of his constitutional rights. As noted earlier, Mr. Hiser will be released from prison on April 18, 1997. At that time, his request for individual injunctive relief will become moot, but not his claim for damages. *See* n.3, *supra*.

The *Cleary* case sought no damages but only class-wide injunctive relief. Petitioners' argument with respect to Mr. Hiser's damages claim is therefore misguided for two separate reasons. First, the claim post-dates *Cleary* and thus cannot be barred by it. *Jackinsky v. Jackinsky*, 894 P.2d 650. Second, *Cleary* cannot bar Hiser's claim for monetary relief given that *Cleary* sought only injunctive relief. It is well established that an individual claim for damages is not barred by a prior class action that sought only declaratory and injunctive relief. *See* Wright, *supra* (1981 and 1995 Supps.); *Cooper v. Federal Reserve Bank of Richmond*, 467

U.S. 867 (1984).[4]

The only portion of Mr. Hiser's as-applied claim that *Cleary* could conceivably affect is the request for individual injunctive relief. As explained below, *if* defendants' photocopying policy had been litigated in *Cleary*, no request for injunctive relief could be entertained by the federal courts. Under those circumstances, Mr. Hiser (and the class) would be relegated to pursuing the remedies provided by *Cleary*. However, the photocopying policy was not litigated in *Cleary*. *See* pp.1-2, *supra*. Thus, the Ninth Circuit was correct in reversing the dismissal of the as-applied claim, both with respect to damages and injunctive relief.

2. The Facial Challenge Is Not Barred By *Cleary*

Mr. Hiser's amended complaint challenges the facial validity of defendants' photocopying policy. This challenge is made on Hiser's own behalf and of behalf of all other Alaska prisoners similarly situated. The Ninth Circuit correctly held that *res judicata* does not bar this claim. This conclusion is mandated by *Ferguson v. Dept. of Corrections*, 816 P.2d 134, and *Hertz v. Cleary*, 835 P.2d 438.

The plaintiff in *Ferguson* was a present member of the *Cleary* class, and thus could have sought to include his claim in *Cleary*. Instead, he waited until after the FSA was finalized to challenge the constitutionality of ADOC's urinalysis testing policy. The defendant prison officials -- the same defendants here -- contended that Ferguson's claim was barred by the preclusive effect of *Cleary*. The Alaska

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[4] As *Cooper* illustrates, a class action for injunctive relief does not bar a subsequent suit for damages even by persons who were members of the first suit. Obviously, if a present class member is still allowed to bring a subsequent damages action, so is an absent member like Hiser.

Supreme Court rejected this argument. Traditional notions of finality, the court held, must be tempered in class-action litigation in order to protect against due process violations:

> Out of concern that it is unfair to preclude a non-named class member from subsequent litigation, many courts modify the traditional *res judicata* tests when the initial litigation is a class action . . . . Typically courts will only preclude [a non-named] class member in subsequent litigation if the class representatives are found to have made a competent attempt to protect [that person's] interests.

Ferguson, 816 P.2d at 138. Having set this standard, the *Ferguson* court then examined whether the class representatives in *Cleary* made a "competent attempt" to protect Ferguson's interests. The court acknowledged that ADOC's drug testing policies "were evaluated on cross motions for summary judgment" in *Cleary*. *Ferguson*, 816 P.2d at 138. However, these policies "constituted a relatively insignificant aspect of the litigation and negotiations" and no expert testimony was adduced concerning them. *Id.* at 138-39. The court therefore rejected the application of *res judicata*.

Applying the *Ferguson* test, the Ninth Circuit correctly decided that Hiser's facial challenge is not barred by *Cleary*. Even if the named plaintiffs in *Cleary* had standing to challenge that policy -- and petitioners introduced no proof of it in the district court -- the Alaska Supreme Court specifically found in *Hertz* that defendants' photocopying policy had *not* been litigated in *Cleary*. *Hertz*, 835 P.2d at 440. (As noted earlier, the photocopying issue could have been litigated but the defendants refused to allow its joinder.) Therefore, *Cleary* could not bar the subsequent litigation of this claim under controlling Alaska law. *Ferguson*, 816 P.2d 134.

According to petitioners, the Ninth Circuit's decision prevents them from obtaining the benefit of the bargain they reached in *Cleary*. In essence, petitioners claim that by signing the "comprehensive" FSA they shielded themselves from all further lawsuits, even those involving unconstitutional behavior of their staff that might occur in future years and, even if, as the Ninth Circuit concluded here, the unconstitutional behavior arose from a separate set of operative facts.

There are two responses to this argument. In the first place, it is the Alaska Supreme Court that limited *Cleary*'s *res judicata* effect, not the Ninth Circuit. Second, petitioners' argument has no support in Alaska law or the law of any other jurisdiction. Petitioners cite no case that supports such a notion because they cannot. Had defendants wanted *Cleary* to bar a future facial challenge to the photocopying policy, they should have supported Mr. Hertz's effort to include that issue in the *Cleary* litigation. By opposing its joinder, they preserved it for another day. That day has arrived.[5]

Petitioners also claim that the Ninth Circuit's decision "divided Alaska's prison system into two legally distinct classes -- those incarcerated during the *Cleary* FSA negotiation process and those who entered the system afterwards." Pet. at 9. That statement is incorrect in two respects. Admittedly, two classes are created. (Two classes are created in every *res judicata* application.) First, it was *Ferguson* that created them, and not the Ninth Circuit. Second, the two classes are differentiated by *issue*, not inmate. As *Ferguson* dictates, *Cleary* bars relitigation of all issues that

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[5] Of course, as noted earlier, even if the photocopying policy had been litigated in *Cleary*, the FSA could not bar Mr. Hiser's suit in federal court pursuing individual damages.

were competently litigated in *Cleary*, but does not bar any others, regardless of who brings them. Even present class members, such as Mr. Ferguson, are not barred from litigating unlitigated claims. Mr. Hiser's issues were not competently litigated in *Cleary*, and thus are not barred.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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